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Buchrezension: Joseph Drexler, Mor Bakhoun, Eleanor M. Fox, Michal S. Gal, David J. Gerber (eds.): Competition Policy and Regional Integratoin in Developing Couuntries (Cheltenham 2012)

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Josef Drexler, Mor Bakhoun, Eleanor M. Fox, Michal S. Gal, David J. Gerbers (eds.): Competition Policy and Regional Integration in Developing Countries – Cheltenham, UK, Northampton, MA, USA: Edward Elgar 2012. xiv, 333 p., ISBN 978 1 78100 430 2

1. Some of the questions raised in the context of competition law and developing countries are: How strong is the need of developing countries for adopting a competition law? Has competition law with respect to developing countries the additional function of controlling multinational enterprises? Or, in an opposite sense, can competition law serve multinational enterprises to open up markets in developing countries? And finally, in the context of regional integration, does competition law have an integration function in the sense that the abolition of state barriers to trade shall not be annihilated by private barriers due to restrictions of competition practiced by private (or public) enterprises?

Leading scholars in the field have collected fourteen contributions exploring in depth these questions. The work is part of a larger project of the editors on the general topic "Competition Law in Developing Countries". Starting point is the analysis of specific regional trade agreements (RTAs) in Africa, Asia and South America. On this basis, general conclusions are drawn. The endeavour is without precedent: The book contains the most thorough analysis of competition rules in regional associations of developing countries submitted so far. The focus of the discussion is not anymore on the question if developing countries and their regional associations need a competition policy but in which way the competition rules have to be conceived. As *Mor Bakhoun* points out in the introduction on behalf of the editors, "the issue of the design of a regional competition law and policy adapted to the economic, political and cultural situation of developing countries remains an unsettled question". This statement already anticipates one of the overall results: There may be universal principles of competition law, but the implementation of these principles has to be compatible with the specific setting in the countries and regional associations concerned. As these circumstances vary from state to state (or even within states), the task of adopting rules adapted for all member states of a RTA is particularly demanding.

2. The overview of selected regional integration groups illustrates the heterogeneity of the research questions: For example, not all ASEAN member states (which reach from Myanmar over Malaysia and the Philippines to Indonesia) have a national competition law. It is therefore not surprising that, at this stage, ASEAN does not have a regional competition regime. *Lawan Thanadsillapakul* and *Anthony Amunategui Abad* discuss different options and argue that it is not so much a centralized competition law which at this stage is needed but rather national competition laws in all member states which should be subject to harmonization by ASEAN. Moreover, the community level, backed by suitable enforcement networks, could assume the task of surveying the enforcement of harmonized law by the national authorities.

Similar patterns can be identified in the analysis by *Gladmore Mamhare* and *Kasturi Moodaliyar* of competition policy within the Southern African Development Community (SADC). National competition rules and experiences are quite different here, too, and no regional competition regime exists with the exception of a declaration on regional cooperation in competition and consumer law. The authors have a preference for a gradual approach, consisting of an improvement of national rules and institutions as well as cooperation before tackling the construction of regional rules and authorities.

Contrary to ASEAN and SADC the West African Economic and Monetary Union (WAEMU) has a regional competition law analysed in this volume by *Mor Bakhoun* and *Julia Molestina*. The particular feature of WAEMU is the radical centralization of competition law: The WAEMU Commission has exclusive competence to apply competition law to the detriment of

national competition authorities which are restricted to cooperation with the regional authority. Moreover, WAEMU has the exclusive legislative power in the field of anti-competitive practices so that the Member States have to content themselves with "secondary law", for example in the field of unfair competition law. The strong degree of centralization has asphyxiated previous efforts of the Member States to develop a national competition policy although the authors qualify this argument by pointing to the endemic "lethargy" of the national authorities. In spite of the centralization, efforts on the community level have remained modest: Not a single decision in the field of cartels or abuse of dominant positions has been adopted so far. The authors recommend empowering national competition authorities with respect to rather national cases while keeping the substantive competition law standards centralized. There should be close cooperation between the regional and the national competition authorities.

The situation is even more complicated for the Economic Community of West African States (ECOWAS). A regional competition law is being further elaborated which overlaps with WAEMU competition law since all WAEMU member states are at the same time members of ECOWAS. *Mbissane Ngom* deals with these and other problems and submits proposals for living with the "normative cohabitation" while underlining the close relationship between competition and development and the special importance of regional integration in the face of barriers which trace back to colonial times.

Javier Cortázar presents the legal situation in the Andean Community. A community competition law exists since 2005, but it has not been applied yet. The author submits proposals for improving the situation underlining for example the need of better funding of the Andean Community. He calls for stronger involvement of the civil society: An NGO could watch over the satisfactory implementation of the competition rules. An interesting feature of Andean competition law is the fact that member states which do not have a competition law of their own may "download" community competition law, i.e. apply it as national law even if there is no interstate element. Even if this option is no longer needed (with Ecuador and Bolivia having adopted domestic competition codes in the meantime), it may serve as a model to other RTAs in the world. With respect to the crucial relevance of good governance, *Cortázar* has found a wonderful formulation which shall not be withheld to the reader of this book review: "Despite the Andean region's long association with the legend of 'El Dorado', it seems that we have become accustomed to thinking that treasures do not exist at all, forgetting that beyond gold cities hidden deep in rain forests there are also other, more earthly and not so inaccessible treasures, for instance, cleverly conceived institutions" (135). The importance of institutions could not be described better. The whole volume may be understood as the application of this insight to the field of competition policy.

In the Caribbean Community (CARICOM), many small states have established a common, respectively a single market. *Taimoon Stewart* and *Delroy S. Beckford* carve out the specific competition law problems of this group of states. The existence of rather big enterprises (due in part to the colonial history) suggests a focus on abuse of dominance, merger control and market access. The acceptance of integration by the people may be strengthened if the power of firms of the Community's stronger states is bridled. The importance of vesting the CARICOM Competition Commission with strong competences is also due to the fact that only two member states, Jamaica and Barbados are equipped with fully operative national competition authorities.

With respect to the Common Market for Eastern and Southern Africa (COMESA), *George K. Lipimile* underlines the importance of competition policy for economic integration. He points to the presence of former state monopolies and other big firms and asks the question if the regional competition rules should not be complemented with a merger control regime based on the 'one stop shop' principle known from the EU. Another important point regards the control function of competition law with respect to foreign firms respectively their

subsidiaries abroad. Developing countries without domestic competition law suffer from not having the instruments which would allow them to prevent or to repress cartels or abusive behaviour of dominant firms. Regional competition law can fill this gap.

3. In addition to the contributions on specific regional integration agreements, the volume contains a number of overarching articles drawing general conclusions. These contributions are authored by world-leading experts on international and global competition law and they can be recommended as mandatory reading to anyone working in the field. *Josef Drexel* deals with the specific integration goal of regional competition law from the perspective of developing countries. Different from RTAs of developed countries he detects a weaker potential of intra-regional trade in associations between developing countries and therefore underlines the globalization aspect: Regional competition policy in the development context should serve to better embed developing countries into the world economy. Moreover, regional competition law should improve the competition culture on the national level. Finally, competition rules should be construed in a way that strengthens individual initiative. – The focus of *David J. Gerber* is on the political dimension of the topic. He draws a distinction between formal regionalization of competition policy and actual enforcement. Whereas policy makers have an interest in using a pro-regional rhetoric, national interests stand in the way of effective implementation of the common rules. It would therefore be mistaken to cherish great expectations for the short term as regards implementation efforts; rather, education and the strengthening of the competition culture should be promoted. – *Eleanor M. Fox* asks the question how competition law and policy should be conceived best for developing countries and their regional integration arrangements. She warns against unquestioningly adopting international standards. Instead, rules should be developed which fit the specific situation of the country or the RTA concerned. She not only discusses six possible models of (regional) competition law for developing countries (underlining the importance of South African competition law in this respect) but puts the topic in the general context of the development goals underlining the special importance of competition policy for mobility and the inclusive empowerment of individuals. – Finally, *Michal S. Gal* and *Inbal Faibish Wassmer* explore the potential of regional competition law for developing countries against the backdrop of weak implementation of these instruments so far. A regional framework law can in particular create economies of scale in the enforcement of competition law, improve evidence gathering, strengthen the voice of the participating states, provide for dissuasion against anticompetitive conduct and overcome the problem of strong national interest groups. However, the authors identify a considerable number of obstacles not only to reaching an agreement but also to its effective enforcement. In response, the authors submit ten suggestions for a successful regionalization of competition law.

4. The book is impressive. It does not only give insights into various and very heterogeneous regions in the world, but makes precise points on international antitrust in the context of developing countries: Regional trade agreements do need competition law in order to fully achieve the advantages envisaged by closer cooperation. In this respect, RTAs between developing countries are not different from equivalents between industrialized countries. The most important difference concerns the specific challenges of developing countries and their impact on experience: While most industrialized states look back on decades, sometimes even on more than a century of antitrust practice, developing countries are confronted with a rather recent policy field. The resulting difficulties have to be solved which – in the context of RTAs – raises the question of which level is best suited to go ahead. In practice, the right answer has not always been found. An approach which is too centralized may hamper the efforts undertaken by Member States of the regional group. On the other hand, too much regional reserve may forfeit the chance of achieving substantial progress. Hence, the common

competition policy should be designed vigorously, but not necessarily exclusively. The principle of subsidiarity should prevail in the field of competition law, too. Legislative and administrative competence should only be allocated to the higher level if the lower level is not able to effectively assume the relevant task. Hence, the answer may vary according to the specific situation of the regional integration group in question. In any event, the implementation of a competition policy on the upper level should not impair the competition culture which already has been flourishing or might develop on the level of the member states.

In order to achieve progress on the path to a regional competition law it will be important to convince states that common rules are also in the national interest. Often, regional competition rules are rejected because the transfer of sovereignty is feared. Therefore, the advantages of common rules must be better communicated. It is also in the interest of domestic firms and consumers that international cartels and monopolies do not exclude or exploit them. With respect to institutions it is clear that a common authority vested with the necessary powers is better suited to discover, pursue and sanction anticompetitive behaviour than a purely national competition office. Competition rules not only create equal rights for all economic actors but they should also establish a level playing field in the economic reality. The book discussed here makes it perfectly clear that a pro-competitive environment is an important condition for further progress on the road to development. The potential for improvement is even larger if the competitive framework is not reserved to the national level but extends to the regional dimension. The task is complex, and errors cannot be excluded. This highly recommendable book shows how to avoid them.

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